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IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

No. ~~1356~~ 174

JOHN SULE

versus

MISSOURI PACIFIC RAILROAD COMPANY, and
NEW ORLEANS PUBLIC BELT RAILROAD

PETITION FOR WRIT OF CERTIORARI TO THE LOUISIANA SUPREME COURT.

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IN THE

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No.

JOHN SULE

versus

MISSOURI PACIFIC RAILROAD COMPANY, and NEW ORLEANS PUBLIC BELT RAILROAD

PETITION FOR WRIT OF CERTIORARI TO THE LOUISIANA SUPREME COURT.

To the Chief Justice of the United States and the Justices of the Supreme Court of the United States:

Petitioner respectfully prays that:

(a) A writ of certiorari issue to review the judgment of the Supreme Court of Louisiana entered on March 1, 1966, whereby petitioner's right and title to a money judgment, based on a jury verdict, of Nineteen Thousand, Seven Hundred Eighty-eight and 73/100 ($19,788.73) Dollars against named defendants, were confiscated and destroyed by state judicial officers acting in excess of their constitutional authority and in violation of petitioner's rights guaranteed by the Seventh and Fourteenth Amendments to the Constitution of the United States.

Petitioner, having incurred serious and disabling injuries as a result of the negligence of agents and employees of Missouri Pacific Railroad Company, tried his claim for damages to a jury. The jury, who by virtue of state law are the sole judges of the facts, returned a verdict for plaintiff in the sum of Nineteen Thousand, Seven Hundred Eighty-eight and 73/100 ($19,788.73) Dollars, based on a

fact finding of negligence hedged by unarguably proper instructions as to the law. Petitioner's right to this money judgment has been taken from him by the Court of Appeal of Louisiana, Fourth Circuit, solely as a result of that court having substituted its findings of fact for that of the jury, without having heard and seen the witnesses and thus without the benefit of demeanor evidence.

Petitioner's application for rehearing before said appellate court, in which he complained that the court's action infringed his rights guaranteed by the Seventh and Fourteenth Amendments to the United States Constitution, perfunctorily was denied. Resort to Louisiana State Supreme Court for writ of review equally was without avail. Thus, petitioner stands deprived of his property without due process.

OPINIONS BELOW

1. Ignoring the findings of fact of the jury, the Court of Appeal of Louisiana, Fourth Circuit, on December 6, 1965, substituted its findings of fact for that of the jury, vacated petitioner's judgment against defendant in the amount of Nineteen Thousand, Seven Hundred Eighty-eight and 73/100 ($19,788.73) Dollars and dismissed his suit. Petitioner, being thus first confronted by the denial of his constitutional right, in his application for rehearing timely filed urged upon that court that the re-examination by it of the jury's findings of fact was proscribed by the provisions of the Seventh Amendment to the Constitution of the United States. Furthermore, petitioner urged, should it be held that the Seventh Amendment was not obligatory on the state, then the right to trial by jury, (especially once having been granted to petitioner by state law), the integrity of its verdict and the rights accruing to petitioner thereunder (which include the rights and privileges defined by the provisions of the Seventh Amend-

ment) were inalienable rights implicit in the concept of ordered liberty and therefore secured to petitioner by the Fourteenth Amendment to the Constitution of the United States and thus the said appellate court's decision, taking away petitioner's money judgment as it did, summarily without hearing the evidence, denied petitioner of his property without due process and equal protection. Petitioner's rehearing application was denied without the assignment of reasons. (*Sule v. Missouri Pacific*, 181 So. 2d 280.) Opinion reproduced Appendix A, *infra*, p. 13.

2. The Louisiana Supreme Court, to which petitioner applied for writ of certiorari or review in respect to the decision of the Court of Appeal of Louisiana, Fourth Circuit, on March 1, 1966, denied petitioner's application ruling as follows:

> "Writ refused. **On the facts found by the Court of Appeal,** there is no error of law in its judgment." (*Sule v. Missouri Pacific Railroad Company, et al,* 182 So. 2d 664).

JURISDICTION

The jurisdiction of this Honorable Court is invoked under 28 U.S.C.A. 1257 (3).

QUESTIONS PRESENTED

1. Is the Seventh Amendment to the United States Constitution obligatory on the states of the Union?

2. Is a citizen denied constitutional due process and equal protection in violation of the Fourteenth Amendment by the action of state judicial officers acting officially as a state appellate court in not only re-examining but in reversing the findings of fact by a jury, without recourse to new trial, where the state by legislative enactment has granted a citizen the right to trial by jury within the contemplation of the Seventh Amendment to the United States Constitution?

STATE STATUTE INVOLVED

The state statute involved and which grants right to trial by jury is Louisiana Code of Civil Procedure, Articles 1731-1814, the text of which is fully reproduced herein as Appendix B, *infra*, pp. 21 to 28, and the organic law sanctioning the enactment of such legislation, namely, Louisiana Constitution, Article 7, Section 41, in part pertinent hereto provides:

> "The legislature **shall** provide for the election and drawing of competent and intelligent jurors for the trial of civil and criminal cases * * * ."

CONCISE STATEMENT OF CASE

On October 12, 1961, petitioner, while operating a mobile crane, became involved in an intersectional collision with a train belonging to Missouri Pacific Railroad Company. As a result he sustained disabling personal injuries, loss of wages and expenses.

In due course he instituted a damage suit against Missouri Pacific Railroad Company and prayed that his claim be tried to a jury. Trial by jury was ordered as to petitioner. Jury trial was held on May 6 and May 7, 1963. After deliberating for approximately two hours, the jury returned to request additional instructions from the trial court. Rather than grant the request, the trial judge declared a mistrial.

Petitioner again tried his case to a jury on November 9, 10 and 12, 1964, which resulted in a verdict in favor of petitioner and intervenor, Transportation Insurance Company, who was the workmen's compensation insurer of petitioner's employer and who sought reimbursement for monies paid to and on behalf of petitioner.

On November 17, 1964, the trial judge entered judgment for petitioner in the amount of Nineteen Thousand,

Seven Hundred Eighty-eight and 73/100 ($19,788.73) Dollars and in favor of intervenor in the sum of Three Thousand, Two Hundred Eleven and 27/100 ($3,211.27) Dollars, together with interest and all costs. On November 27, 1964, the trial judge denied defendant's motion for a new trial. Defendant appealed to the Louisiana Court of Appeal, Fourth Circuit, and on December 6, 1965, that court supplanted the jury's findings of fact as to negligence with that of its own, vacated judgment in favor of petitioner and dismissed his lawsuit.

Thereafter petitioner timely filed application for rehearing in which petitioner contended that the action of the appellate court in re-examining and reversing the findings of fact as to negligence of the jury was proscribed by the Seventh and Fourteenth Amendments to the United States Constitution. Petitioner's application for rehearing was denied without the assignment of reason. Thereafter petitioner timely applied for writ of certiorari or review to the Louisiana Supreme Court. That court on March 1, 1966, denied petitioner's application, noting that on the "facts" found by the "Court of Appeal," there was no error of law in its judgment. Thus the Louisiana Supreme Court has sanctioned the taking of petitioner's money judgment by the process of permitting an appellate court to substitute its findings of fact for that of the jury in the context of State law which institutes the jury as the sole judge of the facts.

REASONS FOR GRANTING RELIEF

The prevailing rule of law in Louisiana in respect to the question of negligence involved in grade crossing collisions is to the effect that although it is the duty of every person operating a vehicle when approaching a grade crossing of a public highway with a railroad to bring his vehicle to a complete stop and look for approaching trains,

the proximate cause of an accident occurring at a grade crossing is for the jury to determine regardless of the statutory obligations to stop, look and listen and the motorist need not come to a complete stop before crossing a railroad track provided he has his automobile or vehicle under such control as to be able to stop immediately and has exercised due care in looking and listening for an approaching train. *Simon v. Texas and New Orleans Railroad Company*, 124 So. 2d 646; *Renz v. Texas and Pacific Railroad Company*, 138 So. 2d 114; *McFallen v. Illinois Central Railroad Company*, 122 So. 2d 845.

Ample evidence was presented to the jury which tried petitioner's case to support the jury's finding that petitioner was free from fault in respect to the occurrence of the collision. Thus, in the historical context of trial by jury, the jury verdict in favor of petitioner on the issue of negligence is conclusive if the evidence, though disputed, contains probative facts sufficient to support it, however much the trial or appellate court may disagree with the jury's findings of fact. (*Basham v. Pennsylvania Railroad Company*, 83 S. Ct. 963 (1963); *Rogers v. Missouri Pacific Railroad Company*, 352 U.S. 500, 77 S. Ct. 443 (1957); *Lavender v. Kurn*, 327 U.S. 645, 66 S. Ct. 740 (1946).

The framers of the Louisiana Constitution gave a mandate to the Legislature of Louisiana to institute trial by jury. Louisiana Constitution, Article 7, Section 41, provides:

> "The Legislature shall provide for the election and drawing of competent and intelligent jurors for the trial of civil and criminal cases * * *."

Acting in pursuance of this constitutional mandate, the Legislature of Louisiana granted to all of its citizens the absolute right to trial by jury by enacting the provisions of Louisiana Code of Civil Procedure, Articles 1731-1814.

The Legislature instituted the jurors in civil cases as the sole judges of the facts and expressly prohibited the trial judge from either recapitulating or even commenting upon the evidence so as not to exercise "any influence upon their decision as to the facts." Louisiana Code of Civil Procedure, Article 1792. The trial court is without authority to alter or modify the verdict of the jury. Its sole remedy or authority is to grant a new trial. It may enter a remittitur or an additur but then only with the consent of the parties and only as an alternative to the granting of a new trial. Louisiana Code of Civil Procedure, Article 1813.

Thus, the citizens of Louisiana have been granted the right to trial by jury in the common law tradition.

The grant of such a right to trial by jury carries with it the grant of the historical attributes of jury trial. Necessarily included among these historical attributes is the proscription of the Seventh Amendment against the reexamination of the findings of the jury by any court. This right, therefore, falls under the protective aegis of the Seventh Amendment, and, operating through the Fourteenth Amendment, its constraint is obligatory on the State of Louisiana. The State having granted petitioner the right to trial by jury, thus instituted trial by jury as a concomitant part of the legal process by which petitioner is entitled to have his rights adjudicated. Consequently, this right to trial by jury is an inalienable right implicit in the concept of ordered liberty and secured to petitioner by the Fourteenth Amendment to the United States Constitution.

A contrary view is logically and legally impermissible. For if the wisdom or judgment of the jury is supplanted by the critical judgment of disagreeing appellate court judges, then indeed there exists no legal creature such as

trial by jury. In such a prospective, trial by jury is but a figment of the imagination, the vagary of legal sophistry. Such a proposition mocks justice. It defies logic, decries tradition and denies petitioner of a legal birthright.

This court last year had occasion to adjudicate in the constitutional area involved in this application, the only exception being that the court was dealing with a jury verdict in a criminal case. *Turner v. State of Louisiana*, 379 U.S. 466, 85 S. Ct. 546. In commenting upon the constitutional standards and constraints that apply once a state has granted right to trial by jury, this court commented (85 S. Ct. at p. 549)

> "This case does not involve the question whether the Fourteenth Amendment requires a state to accord a jury trial to a defendant charged with murder. The question, rather, goes to the nature of the jury trial which the Fourteenth Amendment **commands when trial by jury is what the state has purported to accord.** * * *
>
> "The requirement that a jury's verdict 'must be based upon the evidence developed at the trial' goes to the **fundamental integrity** of all that is embraced in the constitutional concept of trial by jury. 'The jury is an essential instrumentality—an appendage—of the court, the body ordained to pass upon guilt or innocence. * * * *"

Similarly, the proscription against re-examining the findings of fact by the jury by any court is an inherent part of the fundamental integrity of all that is embraced in the constitutional concept of trial by jury. It goes to the very center of trial by jury. In fact it is the sine qua non of jury trial guaranteed to every citizen by the Seventh Amendment.

The action of the judges of the appellate court infringes petitioner's constitutional rights in another area. Admittedly, these judicial officers did not see and hear the

witnesses testify. Thus, they did not have the benefit of demeanor evidence, by which to gauge the credibility of the witnesses and determine the weight to be given to their testimony. But the right to present demeanor evidence is a constitutional right secured to citizens by the Fifth and Fourteenth Amendments to the United States Constitution. *S. Buchsbaum and Company v. Federal Trade Commission*, 153 Fed. 2d 85.

The United States Constitution is the supreme law of the land, binding alike upon states, courts and the people, anything in the constitution or laws of any state to the contrary notwithstanding. *Testa v. Katt*, 330 U.S. 386, 391, 67 S. Ct. 810, 813. The obligation to guard and enforce every right secured by that constitution rests upon the state courts equally with the federal courts. *Mooney v. Holohan*, 294 U.S. 103, 113, 55 S. Ct. 340, 342; *Smith v. O'Grady*, 312 U.S. 329, 331, 61 S. Ct. 572, 573.

The Louisiana Court of Appeal, Fourth Circuit, not only has failed to fulfill this inescapable obligation, but by its decision it has denied to petitioner his federally secured rights. The Louisiana Supreme Court has approved this denial. In fact the Louisiana Supreme Court has augmented or otherwise dramatized this denial. In approving of the judgment of the Court of Appeals it relied not on the facts found by the jury but on the "facts found by the Court of Appeal." Thus it gave greater credence to the fact findings of the Court of Appeal, the judges of which never saw or heard the witnesses, than it did to the fact findings of the jury, as to which the Seventh Amendment proscribes re-examination.

CONCLUSION

The State of Louisiana has granted petitioner a plenary right of trial by jury. Thus the state has purported

to accord petitioner the right to have his claims adjudicated by a jury as a concomitant part of available legal processes. The right not to have the jury findings re-examined by any court goes to the fundamental integrity of all that is embraced in the constitutional concept of trial by jury. In re-examining these findings, the Louisiana Court of Appeal, Fourth Circuit, ~~has~~ denied petitioner of the right to trial by jury. Consequently, the action of this appellate court and of the Louisiana Supreme Court in thus denying petitioner of his right to trial by jury, violates the Seventh and Fourteenth Amendments to the United States Constitution. This action results in a denial to petitioner of his property without due process. He is without remedy other than that which may be secured to him by the grant of this application.

Respectfully submitted,

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CERTIFICATE

STATE OF LOUISIANA
PARISH OF LAFAYETTE

I, J. Minos Simon, counsel for petitioner and a member of the United States Supreme Court, hereby affirm under oath that a copy of the foregoing petition for writs of certiorari has been served on the parties hereto by mail, in a properly addressed envelope, postage prepaid as follows, to-wit:

Honorable Melvin J. Keenan, Clerk
Louisiana Court of Appeals, Fourth Circuit
New Orleans, Louisiana

Mr. Val J. Courville, Clerk
Louisiana Supreme Court,
New Orleans, Louisiana

Phelps, Dunbar, Marks, Claverie & Sims
420 Hibernia Building
New Orleans, Louisiana.

Lafayette, Louisiana; this _____ day of May, 1966.

_____
J. MINOS SIMON

Sworn to and subscribed
before me on this _____
day of May, 1966, at
Lafayette, Louisiana.

_____
Notary Public

APPENDIX A

Dec. 6 1965

COURT OF APPEALS
FOURTH CIRCUIT—STATE OF LOUISIANA

No. 1,927

JOHN SULE
VERSUS
MISSOURI PACIFIC RAILROAD COMPANY and
NEW ORLEANS PUBLIC BELT RAILROAD

APPEAL FROM THE CIVIL DISTRICT COURT FOR THE PARISH OF ORLEANS, No. 405,124, DIVISION "F", HONORABLE PAUL P. GAROFALO, JUDGE.

L. JULIAN SAMUEL
JUDGE

(Court composed of Judges Louis H. Yarrut, L. Julian Samuel and Luther E. Hall)

HATTIER, SCHROEDER & KUNTZ,
HERMAN M. SCHROEDER, for plaintiff-appellee.

PHELPS, DUNBAR, MARKS, CLAVERIE & SIMS,
J. BARNWELL PHELPS and PETER G. BURKE,
for defendant-appellant.

EUGENE J. GOMES, JR., for Continental Casualty Company, intervenor-appellee

REVERSED AND RENDERED.

This is an action to recover damages for personal injuries sustained by plaintiff as a result of a collision between defendant's train and a mobile crane being operated by plaintiff. Transportation Insurance Company, compensation insurer of plaintiff's employer, intervened for workmen's compensation benefits it had paid plaintiff. After

the suit had been filed plaintiff dismissed his action against one of the two defendants, New Orleans Public Belt Railroad, as of nonsuit. The remaining defendant, Missouri Pacific Railroad Co., hereinafter referred to as "defendant", denied negligence on the part of its employee and, alternatively, pleaded contributory negligence on the part of plaintiff. The case was tried to a jury on two occasions. After one mistrial, a verdict and judgment were rendered in favor of plaintiff in the amount of $19,788.73 and in favor of intervenor in the amount of $3,211.27. Defendant has taken this suspensive appeal therefrom.

The undisputed facts are as follows:

The collision occurred at approximately 8 a.m. on October 12, 1961, on a railroad crossing at the river end of Louisiana Avenue in the City of New Orleans. The crossing consisted of a complex of five tracks paralleling the bank of the Mississippi River. There was a large warehouse on the northwest corner and a series of siding tracks on the northeast corner. The first track from the north, that is the land as distinguished from the river side, was a service track for the warehouse. The second track from the north was the westbound main line of the Public Belt Railroad. The third track from the north was the eastbound main line of the Public Belt and it is this third track upon which defendant's train was traveling. A sketch introduced in evidence shows this third track ran in a straight line westerly from Louisiana Avenue for a distance in excess of 2,600 feet. The two remaining tracks were south of the Public Belt tracks. At the time of the accident the weather was clear and dry and a public service bus was stopped on the first track near the warehouse.

Plaintiff, who was on Tchoupitoulas Street proceeding west, was driving a 30 ton mobile crane, the boom of which extended out 25 feet in front of the body of the vehicle

and upward 13 feet off the ground. The mobile crane was an unwieldly, slow vehicle capable of obtaining a speed of 24-25 miles per hour only after prolonged acceleration. Plaintiff was in the driver's seat located in a cab on the left side of the mobile body. To his right was the lower or base portion of the boom. Upon reaching Louisiana Avenue plaintiff turned left, or south, towards the river. He was being followed at a distance of about 10 feet by a loaded tractor-trailer truck. The vehicles were on their way to a place, across the tracks on the river front, frequently used by them for loading and unloading purposes. The crane was to unload the tractor-trailer there. Plaintiff had driven across the track complex on numerous occasions over a period of years and he was thoroughly familiar with the crossing and the area.

The train, consisting of 64 freight cars being pulled by three diesel engines, was proceeding in an easterly direction. The first of the train's three engines struck the rear tandem wheel of the mobile crane as the latter was attempting to complete its crossing of the track. The only evidence contained in the record relative to an emergency stop by this particular train is to the effect that a distance of approximately 500 feet was required in order to make such a stop. An emergency stop was a dangerous maneuver in that it involved possible injury to the train crew and probable damage to the freight being carried and to the train itself.

Although many witnesses testified during a somewhat lengthy trial, only four of these were eye witnesses to the accident: the engineer and fireman of the train, defendant's witnesses; and the plaintiff himself and the truck driver, who testified on behalf of the plaintiff.

The testimony of the two defense eye witnesses was to the following effect: The train was proceeding at a

speed of 8-12 miles per hour (there is no complaint that this exceeded the lawful rate of speed). The engine's horn was blowing and its bell was ringing, both continuously for a distance of approximately 400 feet before it reached the crossing. The engineer, who was on the right side of the cab, first became aware of the crane when it was approximately 150 feet away. He saw the end of the boom as it came out from behind the stopped bus, but only momentarily due to the fact that the body of the engine then blocked his view in that direction. He immediately alerted the fireman who saw the boom at about the same time. When the fireman realized the crane was not going to stop he shouted a warning to the engineer and the latter applied the brakes for an emergency stop approximately 80 feet from the point of impact.

The truck driver testified: The mobile crane stopped momentarily at the tracks to change gears in order to make the slight upgrade. This witness intended to go around the crane at that time in order to arrive at their destination before the crane did. He proceeded to do this but saw the train and heard its bell ringing when the train was approximately 20 feet away. He applied his brakes and stopped before reaching the tracks on which the train was traveling.

Plaintiff testified: The bus had pulled upon the first track next to the warehouse as he made his left turn. He stopped at the track (plaintiff said "probably" on the first track) and looked in both directions. To stop further back would have served no purpose because he could not have seen around the bus. He remained in a stopped position from fifteen seconds to one minute and at that time the forward part of the boom extended over the second track but not over the third, the latter being the track on which the train was traveling. He looked in both directions but

saw nothing and heard nothing. He started across on the slight incline and then saw the train when it was approximately 250 feet away. At that time the boom was over the third track, he had insufficient time to backup, and he "gunned" his motor in an attempt to get safely across. He managed to attain a speed of 4 or 5 miles per hour. We gather from plaintiff's testimony that this is the maximum speed he could expect to attain under the circumstances and in the distance involved.

While counsel have argued the issues of whether or not there was negligence on the part of the railroad, quantum and last clear chance, and counsel for the defendant additionally has argued alleged misconduct before the jury concerning prior statements made by plaintiff and his eye witness, we find it necessary to discuss only the questions of (1) plaintiff's negligence and (2) last clear chance. For even accepting the testimony of plaintiff and his eye witness as true, we are satisfied that (1) plaintiff was guilty of negligence which proximately caused the accident and which bars any recovery by him or by the intervenor, regardless of whether or not there was negligence on the part of defendant, and (2) the doctrine of last clear chance is not applicable.

The present Louisiana Highway Regulatory Act, 310 of 1962, had not been enacted on October 12, 1961, the time of the occurrence of the collision in the instant case. The pertinent statutory law in effect at that time was LSA-R.S. 32:243 A. That statute was applicable to city streets as well as highways, and therefore to this case, in view of Section 1 (8) of the statute defining the word "highway" as "every way or place of whatever nature open to the use of the public for the purpose of vehicular travel". See *Pannel v. Consolidated Parcels*, 164 So. 167. The statute provided:

> "It shall be the duty of every person operating, or permitting to be operated, a vehicle, when approaching a grade crossing of a public highway with any railroad or tramway, to bring such vehicle to a complete stop in such a manner and for such time as to enable the operator to observe the approach of trains or cars, by looking up and down the track in both directions and by listening therefor, before proceeding. In the event it is impossible so to do, then such persons shall proceed only with the greatest caution and at their peril." LSA-R.S. 32:243 A.

Our settled jurisprudence is that, in negotiating a railroad crossing, the driver of a motor vehicle must use his senses of sight and hearing for possible oncoming trains; he is burdened with the responsibility of seeing and hearing that which he might and could have seen and heard; he is required to use such care as is commensurate with the existing danger; and, if his view of the right-of-way is obstructed, he must use a higher degree of caution. *Jackson v. Cook*, 189 La. 860, 181 So. 195; *Tucker v. Illinois Cent. R. Co.*, 141 La. 1096, 76 So. 212; *Bertrand v. Missouri Pacific Railroad Company*, 160 So. 2d 19; *Glisson v. Missouri Pacific Railroad Company*, 158 So. 2d 875; *Hanks v. Arkansas & Louisiana Missouri Ry. Co.*, 62 So. 2d 139; *Rachal v. Texas & P. Ry. Co.*, 61 So. 2d 525.

With regard to the above quoted LSA-R.S. 32:243 A requirement that a motorist must bring his vehicle to a complete stop at a railroad crossing, our jurisprudence is to the effect that, unless the circumstances require such precaution, he need not come to a complete stop before crossing provided he has his vehicle under such control as to be able to stop immediately and has exercised due care in looking and listening for an approaching train. See *Glisson v. Missouri Pacific Railroad Company, supra;*

Simon v. Texas & New Orleans Railroad Company, 124 So. 2d 646; *Robertson v. Missouri Pac. R. Co.*, 165 So. 527.

In the instant case plaintiff was driving a slow, unwieldy vehicle, the 25 foot extending boom of which made it impossible for him to observe approaching traffic at crossings or intersections prior to the time the tip of the boom extended into such crossings or intersections, and his view of the right-of-way was obstructed by the warehouse, by the stopped bus and, to some apparently small extent, by the base and lower portion of the boom. He was under a duty to exercise a high degree of caution. Despite these facts, according to his own testimony, plaintiff stopped and looked but saw nothing and heard nothing. He did not see the train until he was again in motion and until the boom had extended over the track on which the train was traveling. Whether he stopped and looked when in a position where he could not see because of the obstructions, or when his view was not so obstructed and he simply failed to see what he should have seen, is immaterial; the result is the same. He also failed to hear the ringing bell of the engine which his own witness, the truck driver, did hear. Under the circumstances he should have driven much more carefully. It would have been a simple matter, for example, for him to permit the truck driver to proceed ahead of him so as to determine whether or not a train was approaching, and this is especially true in view of the fact that the truck intended to pass the crane in order to arrive at their destination before the crane. We are of the opinion that plaintiff was guilty of gross negligence.

The doctrine of last clear chance or discovered peril is not applicable in the instant case for the reason that one of the necessary elements of that doctrine is absent. The necessary element to which we refer is that the one against whom the doctrine is invoked must have had the means of avoiding the accident by the exercise of reasonable care.

Maryland Casualty Co. v. Gulf, Mobile and Ohio R. Co., 157 So. 2d 302; *Hanks v. Arkansas & Louisiana Missouri Ry. Co., supra.*

Here, assuming but not deciding that there was negligence on the part of the train's operators, those operators did not have the means of avoiding the accident by the exercise of reasonable care. The train could not have been brought to a stop, even an emergency stop, within the distance involved. Plaintiff testified he first saw the train as he started to negotiate the slight incline of the crossing. At that time the boom of his crane was over the track upon which the train was traveling and the train was 250 feet away. This estimate is contradicted by the engineer and the fireman, who estimated the distance as much shorter, and appears to be in conflict with the pertinent part of the testimony given by the truck driver who was plaintiff's witness. But even accepting plaintiff's 250 foot estimate as correct, the train's fireman could have determined that the mobile crane was not going to stop for the crossing and could have conveyed that information to the engineer only at a time when the train was much less than 500 feet from the crossing. And, as we have pointed out, the record establishes that this train could not be brought to an emergency stop in less than 500 feet.

The fireman had the right to assume that the mobile crane would stop before its boom reached the track upon which the train was traveling, and the train was not required to make an emergency stop, until it was apparent to the fireman that the crane was not going to stop. *Parks v. Texas Pacific-Missouri Pacific Terminal R.*, 152 So. 2d 845; *Hymel v. Texas & New Orleans Railroad Company*, 145 So. 2d 138; *South Texas Lloyds v. City of New Orleans*, 142 So. 2d 47; *Bordenave v. Texas & New Orleans R. Co.*, 46 So. 2d 525.

For the reasons assigned, the judgment appealed from is annulled and reversed and it is now ordered that there be judgment in favor of the defendant, Missouri Pacific Railroad Co., and against the plaintiff, John Sule, and the intervenor, Transportation Insurance Company, rejecting the demands of said plaintiff and intervenor; all costs to be paid by said plaintiff and intervenor.

REVERSED AND RENDERED.

APPENDIX B

LOUISIANA CODE OF CIVIL PROCEDURE ARTICLES 1731-1814

Article 1731 Issues triable by jury.

Except as limited by Article 1733, the right to trial by jury is recognized.

The nature and amount of the principal demand shall determine whether any issue in the principal or incidental demand is triable by jury.

Article 1732 Demand for jury trial.

A party may demand a trial by jury of any issue triable of right by a jury in a pleading filed not later than ten days after the service of the last pleading directed to such issue.

Article 1733 Limitation upon jury trials.

A trial by jury shall not be available in:

(1) A suit demanding less than one thousand dollars exclusive of interest and costs;

(2) A suit on an unconditional obligation to pay a specific sum of money, unless the defense thereto is forgery, fraud, error, want or failure of consideration;

(3) A summary, executory, probate, partition, man-

damus, habeas corpus, quo warranto, injunction, concursus, workmen's compensation, emancipation, tutorship, interdiction, curatorship, legitimacy, filiation, separation from bed and board, annulment of marriage, or divorce proceeding;

(4) A proceeding to review an action by an administrative or municipal body; and

(5) All cases where a jury trial is specifically denied by law.

Article 1734 Specification of issues.

In his demand a party may specify the issues which he wishes to be tried by jury; otherwise he shall be considered to have demanded trial by jury for all the issues so triable. If he has demanded trial by jury for only some of the issues, any other party, within ten days after service of the demand or such lesser time as the court may order, may demand trial by jury of any or all of the other issues in the action.

Article 1735 Trial of less than all issues; stipulation.

The trial of all issues for which jury trial has been requested shall be by jury unless the parties stipulate that the jury trial shall be as to certain issues only, or unless the right to trial by jury as to certain issues does not exist, but in all cases there shall be but one trial.

SECTION 2. SELECTION OF JURY

Article 1751 Qualification and exemptions of jurors.

The qualification and exemptions of jurors and the method of choosing and summoning the general venire in jury cases are provided by special laws.

SECTION 3. PROCEDURE FOR CALLING AND EXAMINING JURORS

Article 1761 Procedure in general

In cases to be tried by jury, twelve jurors summoned in accordance with law shall be chosen by lot to try the case. The method of calling and drawing by lot shall be at the discretion of the court. The parties may stipulate for a lesser number of jurors to try the case; or that if one or more of the jurors dies or becomes disqualified the remaining jurors shall try the case.

Article 1762 Swearing of juror before examination.

Every prospective juror, before being examined, shall be sworn to answer truthfully such questions as may be propounded to him.

Article 1763 Examination of juror.

The court shall permit the parties or their attorneys to conduct the examination of a prospective juror and may itself conduct an examination, which shall be limited to ascertaining the qualifications of the juror.

Article 1764 Peremptory challenges

Each side is allowed six peremptory challenges. If there is more than one party on any side, the court may allow each side additional peremptory challenges, not to exceed four. Each side shall be allowed an equal number of peremptory challenges. If the parties on a side are unable to agree upon the allocation of peremptory challenges among themselves, the allocation shall be determined by the court before the examination on the voir dire.

Article 1765 Challenges for cause.

A juror may be challenged for cause based upon any of the following:

(1) When the juror lacks a qualification required by law;

(2) When the juror has formed an opinion in the case or is not otherwise impartial, the cause of his bias being immaterial;

(3) When the relations whether by blood, marriage, employment, friendship, or enmity between the juror and any party or his attorney are such that it must be reasonably believed that they would influence the juror in coming to a verdict;

(4) When the juror served on a previous jury, which tried the same case or one arising out of the same facts;

(5) When the juror refuses to answer a question on the voir dire examination on the ground that his answer might tend to incriminate him.

Article 1766 Time for peremptory challenge.

After the entire jury has been accepted and sworn, no party has the right to challenge peremptorily.

Article 1767 Challenging or excusing jurors after acceptance.

Although the entire jury may have been accepted and sworn, up to the beginning of the taking of evidence, a juror may be challenged for cause by either side or be excused either for cause or by consent of both sides, and the panel completed in the ordinary course.

Article 1768 Swearing of jurors; selection of foreman.

When the jury has been accepted by all parties, the jurors shall be sworn to try the case in a just and impartial manner, to the best of their judgment, and to render a verdict according to the law and the evidence. When the jury has retired, the jurors shall select a foreman to preside over them and sign the verdict which they may render.

Article 1769 Alternate jurors.

The court may direct that one or two jurors in addition to the regular panel be called and empanelled to sit as alternate jurors. Alternate jurors, in the order in which they are called, shall replace jurors who, prior to the time the jury retires to consider its verdict, become unable or disqualified to perform their duties. Alternate jurors shall be drawn in the same manner, shall have the same qualifications, shall be subject to the same examination and challenges, shall take the same oath, and shall have the same functions, powers, facilities, and privileges as the principal jurors. An alternate juror who does not replace a principal juror shall be discharged when the jury retires to consider its verdict. If one or two alternate jurors are called, each side shall have an equal number of peremptory challenges. The court shall determine how many challenges shall be allowed and shall allocate them among the parties on each side. The additional peremptory challenges may be used only against an alternate juror, and the other peremptory challenges allowed by law shall not be used against the alternate jurors.

SECTION 4. PROCEDURE IN JURY TRIALS

Article 1791 Time for charging the jury; recordation of charge.

After the trial of the case and the presentation of all the evidence and arguments, the court shall charge the jury in accordance with law. This charge shall be in writing or recorded in the same manner as testimony taken in the case.

Article 1792 Contents of charge to jury.

In his charge to the jury the judge shall instruct the jurors on the law applicable to the cause submitted to them,

but he shall not recapitulate or comment upon the evidence so as to exercise any influence upon their decision as to the facts.

Article 1793 Instruction to jury; objections.

At the close of the evidence or at an earlier time during the trial as the court reasonably directs, a party may file written requests that the court instruct the jury on the law as set forth in the requests. The court shall inform counsel of its proposed action upon the requests prior to their arguments to the jury.

A party may not assign as error the giving or the failure to give an instruction unless he objects thereto before the jury retires to consider its verdict, stating specifically the matter to which he objects and the grounds of his objection. Opportunity shall be given to make the objection out of the hearing of the jury.

Article 1794 Taking evidence to jury room.

In reaching a verdict the jurors must rely upon their memories, and, when they retire from the jury room to deliberate, they shall not be allowed access to any written evidence or to any notes of the testimony of any witness, but they may take with them any object or document received in evidence which requires a physical examination to enable them to arrive at a just conclusion.

Article 1795 Number required for verdict; stipulation.

In order to render any verdict, nine of the jurors must concur therein. The parties may stipulate, however, that the concurrence of a stated majority of the jurors shall be sufficient for a verdict, and must do so when they have stipulated for a trial by a lessor number in accordance with Article 1761.

SECTION 5. VERDICTS

Article 1811 Special verdicts.

The court may require a jury to return only a special verdict in the form of a special written finding upon each issue of fact. In that event the court may submit to the jury written questions susceptible of categorical or other brief answer, or may submit written forms of the several special findings which might properly be made under the pleadings and evidence, or may use any other appropriate method of submitting the issues and requiring the written findings thereon. The Court shall give to the jury such explanation and instruction concerning the matter submitted as may be necessary to enable the jury to make its findings upon each issue. If the court omits any issue of fact raised by the pleadings or by the evidence, each party waives his right to a trial by jury of the issue omitted unless, before the jury retires, he demands its submission to the jury. As to an issue omitted without such demand the court may make a finding; or, if it fails to do so, it shall be presumed to have made a finding in accord with the judgment on the special verdict.

Article 1812 General verdict accompanied by answer to interrogatories.

The court may submit to the jury, with appropriate forms for a general verdict, written interrogatories upon one or more issues of fact the decision of which is necessary to a verdict. The court shall give such explanation or instruction as may be necessary to enable the jury both to make answers to the interrogatories and to render a general verdict, and the court shall direct the jury both to make written answers and to render a general verdict.

When the general verdict and the answers are har-

monious, the court shall direct the entry of the appropriate judgment upon the verdict and answers.

When the answers are consistent with each other but one or more is inconsistent with the general verdict, the court may direct the entry of judgment in accordance with the answers, notwithstanding the general verdict, or may return the jury for further consideration of its answers and verdict, or may order a new trial.

When the answers are inconsistent with each other and one or more is likewise consistent with the general verdict, the court shall not direct the entry of judgment but may return the jury for further consideration of its answers or may order a new trial.

Article 1813 Remittitur or additur as alternative to new trial; reformation of verdict.

If the trial court is of the opinion that the verdict is so excessive or inadequate that a new trial should be granted for that reason only, it may indicate to the party or his attorney within what time he may enter a remittitur or additur. This remittitur or additur is to be entered only with the consent of the plaintiff or the defendant as the case may be, as an alternative to a new trial, and is to be entered only if the amount of the excess or inadequacy of the verdict or judgment can be separately and fairly ascertained. If a remittitur or additur is entered, then the court shall reform the jury verdict or judgment in accordance therewith.

Article 1814 New trial on showing of misconduct by jury.

A new trial shall be granted if it be proved that the jury was bribed or has behaved improperly so that impartial justice has not been done.